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Supreme Court, U.S.
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No. 93-793

In the Supreme Court of the United States

OCTOBER TERM, 1993

ELEANOR BENT
Petitioner,

v.

MASSACHUSETTS GENERAL HOSPITAL, ET AL
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT
OF APPEALS FOR THE FIRST CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENTS, LAHEY CLINIC FOUNDATION, BURTON MANDEL, M.D., ALAN CORDTS, M.D., SOUTH SHORE HOSPITAL AND FALMOUTH HOSPITAL

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QUESTION PRESENTED FOR REVIEW

Whether plaintiff's Petition for Writ of Certiorari has failed to demonstrate that the Court of Appeals, in affirming a judgment of dismissal for lack of federal subject matter jurisdiction, thereby created a conflict between circuits, significantly departed from accepted and usual course of judicial proceedings, or decided an important question of federal law in a manner in conflict with applicable decisions of this Court, and has thus failed to present any special and important reasons for exercising this Court's discretionary review of the decision below.

PARTIES TO THE PROCEEDINGS BELOW

The parties in the United States Court of Appeals for this First Circuit were the plaintiff, Eleanor Bent, and defendants, Massachusetts General Hospital, Cornelius Granai, M.D., Lahey Clinic Foundation, Burton Mandel, M.D., Alan Cordts, M.D., South Shore Hospital and Falmouth Hospital.[1]

Mrs. Bent's Petition for Writ of Certiorari makes reference to actions taken by numerous other individuals or entities. To the extent that some of these additional apparently named defendants may be deemed parties to the original United States District Court action, even though never properly served with the summons and complaint, none were properly made parties to the proceedings in the First Circuit from which plaintiff now seeks review.

[1] Lahey Clinic Foundation, South Shore Hospital and Falmouth Hospital are all corporate entities which should have been named and referred to as, respectively, Lahey Clinic Foundation, Inc., South Shore Hospital, Inc. and Falmouth Hospital Association, Inc. None of these corporate entities has subsidiaries. South Shore Hospital, Inc., is a subsidiary of South Shore Health and Education Corp.; Falmouth Hospital Association, Inc. is a subsidiary of Falmouth Hospital Foundation, Inc.

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OPINIONS AND JUDGMENTS BELOW

The judgment of dismissal in the United States District Court for the District of Massachusetts, and the judgment and Memorandum opinion of the First Circuit Court of Appeals affirming said dismissal, were unpublished. They are, however, reproduced in essentially accurate form as Appendix E and Appendix A, respectively, to Mrs. Bent's Petition.

The decisions reproduced as Appendix B, Appendix C and Appendix D in Mrs. Bent's Petition were not rendered as any part of the proceedings in this case below, and therefore are not properly before this Court for review.

GROUNDS FOR THIS COURT'S JURISDICTION

Mrs. Bent's petition fails to set forth the specific statutory grounds upon which she invokes this Court's jurisdiction. The only possible grounds for such jurisdiction in this case would be 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const., Amend. 14, § 1

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C., § 1331

> The District Courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C. § 1332(a)

> (a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $50,000.00, exclusive of interest and costs, and is between-
>
> (1) citizens of different States;
>
> (2) citizens of a State and citizens or subjects of a foreign state;
>
> (3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and

(4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

For purposes of this section, section 1335, and section 1441, an alien admitted to the United States for permanent residence shall be deemed a citizen of the State in which such alien is domiciled.

42 U.S.C. § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state or territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other persons within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by The Constitution and laws, shall be liable to the party injured in an action at law, suit in equity or other proper proceeding for redress.

F.R. Civ. P. 8(a)

(a) Claims for Relief. A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim or third-party claim, shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it, (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief the pleaders seeks. Relief in the alternative or of several different types may be demanded.

STATEMENT OF THE CASE

This action alleging various claims essentially sounding in tort was commenced by Eleanor Bent, *pro se*, in the United States District Court for the District of Massachusetts on or about September 24, 1992. Several separate complaints, each purporting to state claims for relief against various physicians and hospitals within the Commonwealth of Massachusetts, were filed by Mrs. Bent simultaneously. The District Court assigned all of these complaints the same docket number and accordingly treated them as one case.

Mrs. Bent subsequently effected service of process upon some, but not all, of the defendants named in her various complaints.

The specific grounds for invoking federal court jurisdiction were not apparent from Mrs. Bent's pleadings. Motions for more definite statements were filed on behalf of defendants Massachusetts General Hospital and Cornelius Granai, M.D., and on behalf of Lahey Clinic Foundation, and Burton Mandel, M.D. Mrs. Bent's further pleadings in response to these Motions still failed to establish a clear basis for federal court jurisdiction. Motions to Dismiss pursuant to F.R. Civ. P. Rules 12(b)(1) and 12(b)(6) for lack of federal subject matter jurisdiction and for failure to state a claim upon which relief may be granted were filed on behalf of all the defendants.

On February 22, 1993, the District Court (Tauro, C.J.), having held a status conference with respect to this case and having considered the pleadings and challenges to jurisdiction raised therein, ordered that this action be dismissed for lack of subject matter jurisdiction. No factual record was created in the District Court.

Plaintiff thereafter sought appeal to the United States Court of Appeals for the First Circuit. The Court of Appeals affirmed

the judgment of dismissal, noting in its Memorandum of Decision that plaintiff had failed to demonstrate federal question jurisdiction under 42 U.S.C., § 1983 and had failed to establish federal diversity jurisdiction under 28 U.S.C., § 1332.

Plaintiff filed her original Petition for Writ of Certiorari in this Court on October 18, 1993. An amended Petition, corrected to comply with this Court's rules for format and citation, was served by plaintiff on or about November 9, 1993, and received by counsel for the within defendants on November 12, 1993.

ARGUMENT

I. Plaintiff's Petition Has Failed To Establish Any Unique Grounds Of Overriding Public Or Constitutional Interest Which Would Warrant This Court's Exercise Of Its Discretionary Certiorari Jurisdiction.

This Court long ago held that the enabling act of Congress creating jurisdiction to review cases from the circuit courts of appeal on Writ of Certiorari

> was intended to vest in this Court a comprehensive and unlimited power. . . . [W]hile this power is co-extensive with all possible necessities and sufficient to secure to this Court a final control over the litigation in all the Courts of Appeal, it is a power which will be sparingly exercised, and only when the circumstances of the case satisfy us that the importance of the question involved, the necessity of avoiding conflict between two or more Courts of Appeal, . . . or some matter affecting the interests of this nation in its internal or external relations, demands such exercise.

Forsyth v. *Hammond*, 166 U.S. 506, 513-15 (1897).

Despite the undenied importance to individual litigants of the decisions rendered by the various circuit courts of appeal, this Court has consistently noted "it is very important that we be consistent in not granting this Writ of Certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal." *Layne & Bowler Corp.* v. *Western Well Works, Inc.*, 261 U.S. 387, 392-93 (1923) (per Taft, C.J.).

Defendants submit that the decisions of the District Court and First Circuit Court of Appeals in this case were correct interpretations of the statutes conferring jurisdiction upon the lower federal courts. Even if there were some colorable basis for arguing that Mrs. Bent had sufficiently invoked federal court jurisdiction, Certiorari still ought to be denied in light of the "manifest impossibility of granting review whenever there is any possiblity that the lower court was wrong." 16 Wright, Miller, Cooper & Gressman, *Federal Practice and Procedure*, § 4004 at 510. Certiorari should be reserved for those cases presenting "constitutional and statutory questions that are likely to have widespread general impact." *Id.* at 508.

Mrs. Bent's Petition seeking Writ of Certiorari fails even to assert that the First Circuit Court of Appeals below has "rendered a decision in conflict with the decsion of another United States Court of Appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort." Supreme Court Rule 10.1(a). She arguably has alleged, but has failed to demonstrate, that the Court of Appeals, "so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision." *Id.* Nor has plaintiff shown that the court

below "has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court." Supreme Court Rule 10.1(c).

Indeed, both the District Court and Court of Appeals expressly *refrained* from deciding any of the constitutional or statutory issues which Mrs. Bent attempted to raise because she had failed in the first instance to demonstrate that the courts below had jurisdiction to consider and decide those issues. *Cf.*, Supreme Court Rule 14.1(i). Defendants therefore submit that, regardless of the merits of the decision below, the "special and important reasons", Supreme Court Rule 10.1, necessary to invoke this Court's Certiorari powers are missing from this case.

II. The Court Below Correctly Determined That Plaintiff Had Failed To Establish Federal Court Jurisdiction Over Her Claims.

"United States District Courts are courts of limited jurisdiction. Creatures of statute, they have only such jurisdiction as the statutes expressly confer, and this jurisdiction must always affirmatively appear." *LeMieux Brothers, Inc.* v. *Tremont Lumber Co.*, 140 F.2d 387, 389 (5th Cir. 1944). *See, generally*, 5 Wright and Miller, *Federal Practice and Procedure*, § 1206. This prerequisite to jurisdiction is reflected in Fed. R. Civ. P. 8(a)(1), which mandates that a complaint affirmatively state "a short and plain statement of the grounds upon which the court's jurisdiction depends. . ."

In her complaint, Mrs. Bent failed to set forth any basis for subject matter jurisdiction in the District Court over her claims against the defendant hospitals and private physicians. Faced

with no affirmative demonstration that it had subject matter jurisdiction over the complaint, the District Court dismissed, and the Court of Appeals properly affirmed.

A. *There is no diversity jurisdiction*

Federal courts have diversity jurisdiction in civil actions where the matter in controversy exceeds the sum of $50,000.00 and is between citizens of different states. 28 U.S.C., § 1332(a). The lack of complete diversity between parties deprives federal courts of jurisdiction over the lawsuit. *Strawbridge* v. *Curtiss*, 7 U.S. (3 Cranch) 267 (1806); *Sweeney* v. *Westvaco Co.*, 926 F.2d 29, 41 (1st Cir.) *cert. denied*, 112 S.Ct. 274 (1991).

Mrs. Bent's complaint does not even assert diversity jurisdiction under 28 U.S.C., § 1332. From the face of the complaint, it is apparent that Mrs. Bent and all of the defendants are citizens of Massachusetts. Thus, federal court subject matter jurisdiction could not have been predicated in this case on diversity of citizenship even if that basis had been alleged.

B. *There is no federal question jurisdiction*

Federal courts also may have subject matter jurisdiction in "civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C., § 1331. When federal jurisdiction is based upon the existence of a federal question, the complaint must refer to the particular federal statute under which the claim allegedly arises and must set forth facts which show that the claim does in fact arise under federal law. *Reid* v. *Hughes*, 578 F.2d 634, 637 (5th Cir. 1978) (general allegation of a federal question is insufficient if it is not supported by matters constituting the claim for relief sought). *See also*,

Orlowski v. *Massachusetts Rehabilitation Comm'n*, 585 F.Supp. 1408, 1409 (D. Mass. 1984) (plaintiff has burden of pointing out federal law giving federal court jurisdiction; otherwise, the court is powerless to act).

In the case at bar, the plaintiff's Complaint at best set forth vague allegations that the various defendants violated the plaintiff's rights to life, liberty and the pursuit of happiness. In the Court of Appeals, Mrs. Bent raised additional claims purportedly under the "United Nations Doctrine". In her Petition to this Court she now also cites the Fourth and Fourteenth Amendments to the United States Constitution and the federal civil rights statute, 42 U.S.C., § 1983. These allegations, absent state action, do not create jurisdiction.

Section 1 of the Fourteenth Amendment to the United States Constitution, states in relevant part:

> . . . nor shall *any state* deprive any person of life, liberty or property without due process of laws; nor deny any person within its jurisdiction the equal protection of the laws.

(emphasis added). 42 U.S.C., § 1983 extends liability for constitutional deprivations by private individuals *if* committed "under color of any statute, ordinance, regulation . . . of any state . . ." The mere allegation that the defendants violated plaintiff's constitutionally guaranteed rights, without any allegation of state action, did not satisfy Mrs. Bent's burden of proving the existence of federal court jurisdiction.

State action is present "when the state, by its law, has compelled the act." *Flagg Bros., Inc.* v. *Brooks*, 436 U.S. 149, 164 (1978) (citations omitted). *See also, Blum* v. *Yaretsky*, 457 U.S. 991 (1982). Mrs. Bent's Complaint did

not allege that the actions of the various defendants were either compelled or encouraged by state law.[2]

Plaintiff's allegations amount to charges of medical malpractice or intentional tort against numerous private physicians and private hospitals on theories of negligence, intentional withholding of information, intentional spreading of misinformation, conspiracy, wrongful death and restraint of physical liberty by means of an involuntary psychiatric hospitalization. On the face of the Complaint, none of these actions could fairly be attributable to the state. Thus, none of these claims establish any basis for federal jurisdiction under the Fourteenth Amendment, 42 U.S.C., § 1983, or 28 U.S.C., § 1331. *Flagg, supra; Blum, supra; Lugar, supra. See also, Joyce* v. *Ferrazzi*, 323 F.2d 931 (1st Cir. 1963); *Spencer* v. *Lee*, 864 F.2d 1376 (7th Cir. 1989); *Harvey* v. *Harvey*, 949 F.2d 1127 (11th Cir. 1992).

Defendants submit that plaintiff's Complaint, even read with all due leniency because of her *pro se* status, *Haines* v. *Kerner*, 404 U.S. 519, 520-21 (1972), failed to establish any basis for the exercise of federal jurisdiction in the court below. Whatever may be the merits of her state law claims, her *federal law claims* are either non-existent or insubstantial.

This Court has consistently held that the mere presentation of some issue tangentially involving federal law is not sufficient to vest a United States District Court with jurisdiction. In *Hagans* v. *Levine*, 415 U.S. 528, 536-37 (1974), this Court summarized and re-affirmed this doctrine:

[2] Indeed, many of plaintiff's allegations, if substantiated, would set forth claims for *violations* of state law. *See, Lugar* v. *Edmonson Oil Co., Inc.*, 457 U.S. 922, 937 (1982) (private abuse of a state statute does not constitute the "exercise of some right or privilege created by the state or rule of conduct inposed by the state", and thus fails to give rise to a section 1983 claim).

> the federal courts are without power to entertain claims otherwise within their jurisdiction if they are 'so attenuated and unsubstantial as to be absolutely devoid of merit"; "wholly unsubstantial"; "obviously frivolous"; "plainly unsubstantial"; or "no longer open to discussion". One of the principal decisions on the subject held, first, that "[in] the absence of diversity of citizenship, it is essential to jurisdiction that a *substantial* federal question be presented."

(emphasis added; citations omitted).

CONCLUSION

The judgment of the Court of Appeals for the First Circuit as to which plaintiff seeks a Writ of Certiorari was consistent with decisions of this Court and of the other circuit courts of appeal with respect to all relevant constitutional and statutory provisions. Plaintiff has failed to demonstrate in her Petition any constitutional or statutory question of overriding importance or interest to the general public warranting this Court's discretionary review.

Defendants Lahey Clinic Foundation, Burton Mandel, M.D., South Shore Hospital, Falmouth Hospital and Alan Cordts, M.D., respectfully request that plaintiff's Petition for Writ of Certiorari be denied.

Respectfully submitted,
By their attorneys,

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